



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1995

Mr. Leonard H. Dougal
Small, Craig & Werkenthin
100 Congress Avenue, Suite 1100
Austin, Texas 78701-4099

OR95-1284

Dear Mr. Dougal:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36790.

The Texas Boll Weevil Eradication Foundation, Inc., which you represent, received a request for "a list of all growers in the Lower Rio Grande Valley Boll Weevil Eradication Zone who have not paid their assessment." You claim as a threshold issue that the Texas Boll Weevil Eradication Foundation (the "foundation") is not a governmental body as defined by chapter 552 of the Government Code. You also assert that the requested information, should we determine that the foundation is a governmental body for purposes of chapter 552, is excepted from required public disclosure under section 552.101 of the Government Code.

Section 552.003 of the Government Code provides

(1) "Governmental body":

(A) means:

(i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

(ii) a county commissioners court in the state;

(iii) a municipal governing body in the state;

(iv) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;

(v) a school district board of trustees;

(vi) a county board of school trustees;

(vii) a county board of education;

(viii) the governing board of a special district;

(ix) the governing body of a nonprofit corporation organized under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes), that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code; and

(x) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and

(B) does not include the judiciary.

(2) "Manipulation" means the process of modifying, reordering, or decoding of information with human intervention.

(3) "Processing" means the execution of a sequence of coded instructions by a computer producing a result.

(4) "Programming" means the process of producing a sequence of coded instructions that can be executed by a computer.

(5) "Public funds" means funds of the state or of a governmental subdivision of the state.

(6) "Requestor" means a person who submits a request to a governmental body for inspection or copies of public information.¹

¹Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 2, 1995 Tex. Sess. Law Serv. 5127, 5128 (Vernon) (to be codified as Gov't Code § 552.003).

The foundation is a nonprofit corporation established pursuant to sections 74.101 through 74.127 of the Agriculture Code.² The task of boll weevil eradication has been delegated to the foundation by the legislature.³ This task would otherwise fall to the Department of Agriculture (the "department").⁴ The foundation has express rule-making authority,⁵ another delegation of power by the legislature that would otherwise be invested solely in the department. The statutes governing the foundation create more than a mere arms-length relationship with the department. *See generally* Attorney General Opinion JM-821 (1987) (nonprofit volunteer fire department that enters into contract with governmental body is more likely to fall within Open Records Act than is typical private vendor of goods in arms-length transaction because fire protection is traditionally governmental service). The two entities interact to such an extent that the foundation is essentially an arm of the department functioning as a consultant on boll weevil eradication.⁶ *See* Attorney General Opinion JM-36 (1983) at 2 ("consultant" includes

²The Seventy-fourth Legislature substantially amended portions of sections 74.101 through 74.127 of the Agriculture Code. Act of May 8, 1995, 74th Leg., R.S., ch. 227, 1995 Tex. Sess. Law Serv. 1976 (Vernon).

³*Id.* § 1, 1995 Tex. Sess. Law Serv. at 1976 (Vernon) (to be codified at Agric. Code § 74.101(c)).

⁴Agric. Code §§ 12.001 ("department shall execute all applicable laws relating to agriculture"), 12.007 ("department shall . . . investigate the habits and propagation of insects that are injurious to the crops of the state and the best methods for their destruction"); Act of May 29, 1995, 74th Leg., R.S., ch. 957, §§ 1, 2, 7, 1995 Tex. Sess. Law Serv. 4751, 4752-53 (Vernon) (to be codified at Agric. Code §§ 74.001) ("[C]otton pests are a menace to the cotton industry, and that control of those pests is a public necessity. Any portion of the state that is susceptible to infestation by cotton pests must be protected from this public nuisance and threat to the continued stability of the cotton industry."), 74.002(2) ("Cotton pest" includes the boll weevil and the pink bollworm.), 74.009 ("The state shall employ all constitutional methods to control and eradicate cotton pests that scientific research demonstrates to be successful.").

⁵Act of May 8, 1995, 74th Leg., R.S., ch. 227, § 15, 1995 Tex. Sess. Law Serv. 1976, 1981 (Vernon) (to be codified at Agric. Code § 74.120(c)).

⁶Agric. Code §§ 74.103 (certification by Commissioner of Agriculture), 74.107(b) (commissioner's approval needed for change in number of board positions or eradication zone representation on board), 74.112(c)-(d) (final report filed with commissioner, remaining funds submitted to commissioner, commissioner pays foundation's outstanding obligations from funds), 74.114(c) (commissioner adopts rules for voting in initial board election and referenda), 74.116(a) (commissioner adopts criteria for exemption from payment of assessment penalties), (c)-(g) (interaction of commissioner and foundation concerning exemptions), 74.118(a), (d), (e) (commissioner has authority to prohibit planting of cotton and compel participation in eradication program), 74.119 (department has authority for destruction or treatment of cotton in eradication zones), 74.127(a) (board is subject to Texas Sunset Act), (b) (commissioner may order dissolution of foundation); Act of May 8, 1995, 74th Leg., R.S., ch. 227, §§ 6, 8, 10-11, 13-20, 1995 Tex. Sess. Law Serv. 1976, 1978-82 (Vernon) (to be codified at Agric. Code §§ 74.109(b)) (board to submit to commissioner report itemizing all income and expenditures and describing all activities of foundation during fiscal year), (h) (revenue collected used solely to finance programs approved by commissioner), 74.112(a)-(b) (approval by commissioner for discontinuation of program and foundation), 74.114(f) (ballots initially determined by commissioner), 74.115(b)-(c) (department enforces destruction of plants and perfects lien on cotton), 74.117 (entry of premises, eradication activities, and inspections by department, foundation, or designated representative of either entity), 74.118(b) (commissioner may adopt rules prohibiting planting of noncommercial cotton and

persons who are authorized to act, and do in fact act, in official capacity on behalf of governmental body), Open Records Decision No. 499 (1988) at 3 (whether consultant acts as agent for governmental body is usually determined by agreement between them, but where there is no contract, question depends on nature of relationship between governmental body and consultant); *see also* Open Records Decision Nos. 499 (1988) at 2, 485 (1987) at 5-6, 462 (1987) at 4 (relevant facts in determining whether information held by consultant is subject to Open Records Act are: 1) information collected by consultant relates to governmental body's official business; 2) consultant acts as agent of governmental body in collecting information; and 3) governmental body has or is entitled to access to information). Moreover, the Seventy-fourth Legislature expressly exempts certain information of the foundation from the requirements of chapter 552 of the Government Code.⁷ Accordingly, it is clear that the Seventy-fourth Legislature intended that the foundation be considered a governmental body for purposes of the open records laws, chapter 552 of the Government Code. *See* Attorney General Opinion JM-120 (1983) at 1-2 ("[w]e are obliged to interpret the statute in a way which expresses only the will of the makers of the statute"). We will, therefore, address the applicability of section 552.101 to the information at issue.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information... is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

(Footnote continued)

compel participation in eradication programs), 74.120(a) (commissioner has authority to adopt rules to protect individuals, livestock, wildlife, and honeybee colonies), (c) (foundation and department have authority to adopt other reasonable rules necessary to carry out purposes of subchapter), 74.122 (department may adopt rules relating to quarantine areas), 74.123 (department has authority over documenting regulated articles), 74.124 (foundation may enter into cooperative agreements with federal government, state agency, foreign countries, including cost sharing and division of duties and responsibilities), 74.125 (board in cooperation with commissioner shall develop rules and procedures relating to organic producers), 74.126(c) (commissioner or foundation may determine whether violation of subchapter or rule adopted under subchapter has occurred and request attorney general or county or district attorney to file suit).

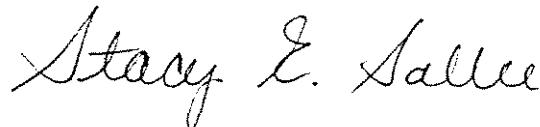
⁷Act of May 8, 1995, 74th Leg., R.S., ch. 227, § 10, 1995 Tex. Sess. Law Serv. 1976, 1980 (Vernon) (to be codified at Agric. Code § 74.114(j)).

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

You claim that the publication of a person's debts constitutes an invasion of common-law privacy. Although we agree that this type of financial information constitutes highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, there is a legitimate public interest in knowing whether a cotton grower has complied with eradication assessments.⁸ Accordingly, you must release the requested information.⁹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

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⁸Act of May 8, 1995 74th Leg., R.S., ch. 227, § 11, 1995 Tex. Sess. Law Serv. 1976, 1980 (Vernon) (to be codified at Agric. Code § 74.115(b)-(c)) (grower who fails to pay all assessments and penalties shall destroy cotton subject to assessment--cotton plants not destroyed are public nuisance and department may destroy plants or perfect lien on cotton produced and harvested); Act of May 29, 1995, 74th Leg., R.S., ch. 957, §§ 1, 2, 7, 1995 Tex. Sess. Law Serv. 4751, 4752-53 (Vernon) (to be codified at Agric. Code §§ 74.001) ("[C]otton pests are a menace to the cotton industry, and that control of those pests is a public necessity. Any portion of the state that is susceptible to infestation by cotton pests must be protected from this public nuisance and threat to the continued stability of the cotton industry."), 74.002(2) ("'Cotton pest' includes the boll weevil and the pink bollworm."), 74.009 ("The state shall employ all constitutional methods to control and eradicate cotton pests that scientific research demonstrates to be successful.").

⁹We note that home addresses and phone numbers are not "intimate" information; this information is not protected for applicants, probationers, or private citizens. Open Records Decision Nos. 478 (1987), 455 (1987).

Ref: ID# 36790

Enclosures: Submitted documents

cc: Mr. Charles Eubanks
P.O. Box 343
Santa Rosa, Texas 78593
(w/o enclosures)